WISHA REGIONAL DIRECTIVE
WISHA Services
Department of Labor and Industries

27.00 CONTRACTOR RESPONSIBILITY UNDER *STUTE V. PBMC*

Date: August 1, 2001

I. Background

On March 29, 1990, the Washington Supreme Court held in *Stute v. PBMC*[1] that a general contractor could be held liable for an injury to a subcontractor's employee that occurred as a result of a Washington Industrial Safety and Health Act (WISHA) violation. This decision clarified construction law regarding the liability of a general or prime contractor, which has created a dramatic change in the construction industry.

Since the *Stute* decision, the Washington Courts of Appeals have extended the rule to include an upper tier subcontractor, *Husfloen v. MTA Construction*[2]; and owner/developers, *Weinert v. Bronco National Co.*[3] In *Weinert*, the Court of Appeals held that the owner/developer held a position so comparable to the general contractor that the owner/developer was also responsible to all employees on the work site. On January 7, 1991, in *Doss v. ITT Rayonier*[4] the Court of Appeals extended the rule in *Stute* to impose potential liability to a landowner whose independent contractor failed to comply with safety and health regulations.

Although *Stute* and subsequent cases have established the potential liability, the appellate courts have yet to articulate what, if any, defenses are available to general or prime contractors who exercise control and authority over the job site (see, for example, *Moen Co. v. Island Steel*[5] for the state Supreme Court's approval of contract language designed to enforce safety on the job site).

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[1] 114 Wn.2d 454, 788 P.2d 545 (1990)

[2] 58 Wn. App. 686, 794 P.2d 859 (1990)

[3] 58 Wn. App. 692, 795 P.2d 1167 (1990)

[4] 60 Wn. App. 125, 803 P.2d 4 (1991)

[5] 128 Wn.2d 745, 912 P.2d 472 (1996)

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Given the concern over tort liability and the Department's need to clarify its policy regarding the issuance of citations under WISHA, a Task Force was formed in January 1993, to develop a WISHA Regional Directive (WRD) that would set forth a "duty of care" that the Department of Labor and Industries (L&I) and the contractor community would recognize as an affirmative defense.

The original *Stute* Task Force met on a monthly basis and included the following members:

Associated Builders and Contractors of Western Washington
Associated General Contractors of Washington
Association of Washington Businesses
The Boeing Company
District Council of Carpenters
Construction Advisory Task Force
Douglas B.M. Ehlke, Attorney at Law
Department of General Administration
Department of Labor and Industries
Office of the Attorney General, Labor and Industries Division
National Electrical Contractors Association,
Puget Sound Chapter
State Building Trades Council
Washington State Department of Transportation
United Subcontractors Association

In addition to fostering a strong commitment to worker safety and viable relationship between the contractor community and L&I, the goal of the *Stute* Task Force was to develop a WRD that would be applicable on a statewide basis and would clarify L&I's expectations in a manner that recognized the needs of the contractor community and promoted worker safety.

The resulting WRD was a result of mutual cooperation, creative problem solving, compromise, and the universal recognition that all will receive the benefits of a safe working environment.

In 2000, largely in response to concerns raised by members of the contractor community, the Construction Advisory Committee and L&I agreed to convene a new working group to clarify and build upon – but not significantly modify – the previous WRD. The current WRD is the result of those discussions.

II. Scope

This WRD establishes guidelines for WISHA enforcement and consultation staff when assessing a prime or general contractor's compliance with WISHA as it applies to a subcontractor or its employees. Additionally, the purpose of this WRD is to further clarify affirmative defenses that L&I will recognize that are available to the general or prime contractor. This WRD does not cover property owners or developers who are not general or prime contractors.

This document represents L&I enforcement policy, providing the department's interpretation of appropriate application of the WISHA in such situations. As with any enforcement document, nothing precludes an employer from raising other defenses that are not reflected in this WRD.

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For the purposes of this document, "general contractor" and "upper-tier subcontractor" refer to any entity whose business operations involve the use of any unrelated building trades or crafts whose work the contractor will superintend in whole or in part.

Subcontractor" refers to any contractor that is subordinate to a general or upper-tier contractor.

III. Application Guidance

A. *What is the basis for holding general contractors liable for violations by subcontractors?*

In addition to the general concepts of creating or correcting employers (on which federal OSHA's policy guidance on this issue is based), the *Stute* decision and subsequent rulings have established that general contractors may be liable for WISHA violations committed by subcontractors under their control.

B. *When does L&I consider a general or upper-tier subcontractor liable for a subcontractor's violation?*

In establishing that general contractors owe a "duty of care" to all employees on the work site, the court cases have not clearly established when the "duty" is breached. However, L&I accepts the "standard of care" described in Part IV of this WRD – which is patterned after the "Employee Misconduct" defense recognized by the courts and Washington law as an affirmative defense in OSHA and WISHA citations -- as an affirmative defense against parallel citations for violations committed by a subcontractor.

C. *Do general and upper-tier contractors have the same level of responsibility as the actual employer?*

This WRD reflects the understanding that the duty of care for general and upper-tier subcontractors is lower than the duty of care an employer owes to his or her own employees. WISHA recognizes that general and upper-tier subcontractors are not "strictly liable" for WISHA violations committed by their subcontractors.
It should be noted that this understanding reflects only the general "duty of care" inherent in the role of a general or upper-tier contractor. Where a general or upper-tier contractor is the "creating" or "correcting" employer, it may be subject to citation even if the subcontractor is not (for example, the subcontractor might successfully defend itself using the argument that the hazard was created by the general contractor and could not be controlled by the subcontractor).

D. *Can a general contractor be cited solely for failing to meet the "standard of care" in Section IV?*

No. Section IV is an issue only to the extent that a subcontractor is being cited and the question of the general contractor's liability is being considered (a general contractor will not be issued a parallel citation if there is no underlying subcontractor violation). Although some of the items in Section IV are required by WISHA standards and can therefore be cited when they are absent, no employer can be cited for a failure to comply with Section IV that is not also a failure to comply with a particular WISHA standard.

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IV. Responsibilities of a General Contractor raising the defense that it has met the "Standard of Care" described by this WRD:

When a WISHA violation is being issued to a subcontractor working under the control of a general or upper-tier contractor, the general or upper-tier contractor can argue that it has met its responsibilities to promote safety and health on the workplace and therefore is not responsible for the violation.

Before L&I will accept such an affirmative defense, the general contractor must fulfill its responsibilities, as outlined in this section.

A. *What is a general contractor's general responsibility under WISHA?*

Because the general contractor has authority to influence working conditions on a construction site, the general contractor has ultimate responsibility under WISHA for job safety and health at the job site in all common work areas, including work areas defined in all contracts under the scope of work to be performed at the job site.

B. *What about situations where there is more than one general contractor on a site?*

Where there is more than one general contractor on the job site, they must coordinate safety and health activities in a manner consistent with this WRD.

C. *How must a general contractor demonstrate that it is meeting this responsibility by preparing for the job?*

A general contractor must demonstrate that it is meeting these responsibilities by fulfilling the following responsibilities:

1. The general contractor must contractually require its subcontractors to provide all safety equipment required to do the job, or furnish the required safety equipment. Additionally, the general contractor may contractually require the subcontractor to reimburse the general contractor for liability incurred as a result of safety violations committed by the subcontractor or its employees. However, these contractual clauses are effective as an enforcement mechanism only to the extent that they are communicated to the subcontractor, and actually enforced.
2. The general contractor must take reasonable steps to ensure that it has established work rules that are designed to prevent violations of the Act. To accomplish this, the general contractor must:
    a. Develop and implement an Accident Prevention Program that:
        - Includes its roles and responsibilities pertaining to safety;
        - Includes training and corrective action; and
        - Is tailored to the safety and health requirements of particular plants, job sites or operations that may be involved.

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b. Where appropriate, develop a written site specific Safety Plan that addresses and coordinates the safety issues of all its subcontractors at the site.

(1) The general contractor must develop or require its subcontractors to develop, limited to the scope of the subcontract, site specific plans that:

- Identify anticipated hazards that will most likely be encountered in all phases of the project; and
- Identify the specific means that will be used to address these hazards.

For example, if there are two or more contractors on the job site where guarding is required in common areas to provide adequate fall protection, the general contractor must address how the general contractor and the other contractors will coordinate their efforts to provide protection.

(2) It is the general contractor's duty to require that a site specific Safety Plan is developed in a manner consistent with the Act. It is not the general contractor's duty to select or interfere with the means of appropriate safety protection selected by its subcontractors.

c. Require its subcontractors to have Accident Prevention Programs *and* site specific plans consistent with the Act.

d. Develop a management plan that not only confirms existence of subcontractor required programs/plans, but also assures review for compliance with the Act and conformance with the project.

For example, the general contractor may request its subcontractors to respond to a Safety Questionnaire in a form that is substantially similar to Appendix A. However, in the event such a request is made, it is not required of any general contractor to confirm its subcontractors' WISHA citation history with the Department of Labor and Industries under this subsection and the general contractor may rely on reasonable representations made by its subcontractors.

e. Make the Accident Prevention Program *and* all site-specific safety plans available *and* accessible in accordance with the Act. The general contractor must develop a site specific Safety Plan, or require its subcontractors to develop a plan limited to the scope of the contract, that:

- Identifies all anticipated hazards that will most likely be encountered in all phases of the project; and
- Identifies the specific means that will be used to address the hazard.

For example, if trenching is identified as a particular phase of the project for a subcontractor, the plan must identify the specific means of protection that will be used. (for example, trench boxes, shoring, sloping, etc.) It is not sufficient to state that the excavation codes will be followed, or that the contractor will use either trench boxes, shoring, or sloping.

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3. Other considerations: In order to establish work rules that are designed to enhance safety and health and to prevent violations of the Act, the general contractor may wish to consider:
    - Preparing agendas for job safety meetings;
    - Mandatory attendance of all workers at job site safety meetings;
    - Promote communication between the general contractor and its subcontractors;
    - Common work areas;
    - Safety incentive or recognition programs to reward employees based on actual compliance with safety rules and regulations. However, these programs may not include or be based on the rate of reported injuries;
    - Programs to reward employees for making safety suggestions.

D. *What are a general contractor's obligations to communicate health and safety expectations?*

The general contractor must adequately communicate work rules to its subcontractors. For example, to accomplish adequate communication of work rules, the general contractor may use:

- videos;
- other methods or media that will communicate safety rules.

E. *What are a general contractor's obligations to discover and control health and safety violations?*

The general contractor must show that it has established an overall process to discover and control recognized[6] hazards.

1. The degree of oversight by a general contractor depends on the level of the subcontractor's activity, experience with the subcontractor (both on that job site and previously), and awareness of the subcontractor's commitment to health and safety.[7]
2. The degree of oversight necessary also depends upon the level of specialized expertise required to identify health and safety problems. A general contractor relying upon a specialized subcontractor who has not been given reason to doubt the subcontractor's safety efforts may rely upon the subcontractor's representations with regard to the control of hazards when violations could not be expected to be readily apparent to the general contractor.

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[6]Recognized by the industry or by the contractor in the past.

[7]WAC 296-155-110 requires weekly inspections by each employer, for both general contractors and subcontractors. Additionally, every employer is required to conduct walk-around safety inspections at the beginning of each job, and at least weekly thereafter. The inspection must be conducted jointly by one member of management and one employee, elected by the employees as their authorized representative.

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3. Similarly, a general contractor is not required to inspect a subcontractor's equipment for health and safety violations (unless there is reason to doubt the subcontractor's safety efforts). Under normal circumstances, it is sufficient for the general contractor to establish clear expectations for such inspections and to rely on the subcontractor's representations that they have in fact been conducted.
4. The general contractor must develop a plan that will reasonably discover violations of its Accident Prevention Program or Safety Plan. The general contractor may wish to consider:
   - audits;
   - assessments;
   - reviews; and
   - training.

F. What must a general contractor do to correct health and safety violations and enforce health and safety rules?

Disciplinary action related to safety violations must be communicated to the appropriate work force.

The general contractor must show it has effectively enforced in practice its Accident Prevention Program and/or Safety Plan when it discovers safety violations through the following methods.

1. The general contractor must provide contractual language that requires its subcontractors to comply with all safety rules.
2. The general contractor must require its subcontractors to have and enforce a disciplinary schedule that will be followed by its subcontractors in the event safety violations are discovered, regardless of who makes the discovery. Appropriate disciplinary action must not be contingent upon the issuance of a WISHA citation.
3. The plan must include a method of documenting safety violations, as well as a method of recording what, if any, appropriate disciplinary action is taken.

   Note: In this context, disciplinary action includes verbal or written reprimands, demotion, suspensions of work, reduction in pay, or termination. While it does not include corrective counseling, effective disciplinary action must be taken where appropriate.
4. The Contract between the general contractor and its subcontractors should provide for the means and methods to allow the general contractor to effectively promote safety in the work site.

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G. What additional factors will the department consider in determining whether the general contractor's methods of enforcement have been effective in practice?

1. The Department will consider the following records when determining whether the general contractor's methods of enforcement have been effective in practice.
   - WISHA inspections;
   - Previous incentive awards;
   - Previous projects with good safety records;
   - Experience factors/ratings;
   - Documentation of awards of merit for safety;
   - Documentation of actions taken by the general contractor to log safety and health violations and what corrective action was taken to address the concern; and
   - Employee and subcontractor interviews and the degree to which the general contractor's enforcement mechanisms are taken seriously by those working on the site.
2. A safety program may be found "effective in practice" even if there are isolated instances of a code violation. For example, if there are ten subcontractor employees working at heights greater than ten feet, and all but one are tied off appropriately, the general contractor's safety program may still be found to be "effective in practice." However, if a substantial number of the employees are not tied off, the general contractor's safety program is not "effective in practice."

   Similarly, an inspector who finds a dozen instances where a subcontractor has properly guarded its saws and one instance where there is an unguarded saw in violation of the code may still consider the general contractor's safety program to be "effective in practice."

   Or an inspector might identify a single subcontractor employee among several who had a slight growth of facial hair that interfered with his respirator fit. In addressing such an isolated situation that had not otherwise been brought to the general contractor's attention (and assuming that the necessary respiratory protection programs themselves are in place), the inspector can still consider the general contractor's safety program to be "effective in practice." In contrast, even a single employee wearing a full beard in such circumstances would suggest a longer-term problem and would be likely to be considered a violation of the general contractor's duty of care.

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As a further example: In considering whether a general contractor with 10 subcontractor employees working at heights greater than 10 feet has met its obligations when all written programs are in place, weekly safety toolbox meetings are held, a foreperson on the job site conducts safety inspections periodically and whenever other routine inspection of the work's progress is made, and the procedures outlined in A through F above have been established, the following distinctions may be useful:

- A citation would not be issued to the general contractor if one subcontractor employee is exposed to a fall hazard of more than 10 feet and is wearing fall protection, but that fall protection is defective *and* the defect is neither readily apparent nor otherwise known to the general contractor;
- A citation would normally not be issued to the general contractor if one subcontractor employee is exposed to a fall hazard greater than 10 feet and is wearing fall protection equipment but has not actually tied off *and* the failure to tie off is neither readily apparent nor otherwise known to the general contractor;
- A citation would normally not be issued to the general contractor if one subcontractor employee is exposed to a fall hazard greater than 10 feet and is not wearing fall protection *and* the failure to wear fall protection is not readily apparent, not of extended duration, and not otherwise known to the general contractor.
- A citation would be issued to the general contractor in any of the above examples if the general contractor had actual knowledge of the violation and failed to take effective steps to correct the violation.

In making a determination as to whether the general contractor's program is effective in practice in relation to the identified violations, the department will consider such additional factors as the following:

- The number, nature, and type of violations found at the site in relationship to the size of the worksite and the amount of work taking place (one unguarded saw on a worksite with 35 people working versus three people not tied off on a worksite with seven people working, nine serious violations found at a large worksite versus one violation, versus general violations, etc.).
- The "foreseeability/preventability" of the violation (for example, ironworkers or roofers not using fall protection versus one guardrail that was removed for a few moments by a contractor, and all other guardrails were in place).

Because the very nature of the question as to whether a general contractor or upper-tier subcontractor's enforcement is "effective in practice" requires consideration of the specific facts in a given situation, it is impossible to come up with a simple or short definition of the phrase. The weight to be given a particular factor may vary, depending on its value, in determining whether the program was effective in a particular situation. For this reason, the above guidance should be considered illustrative, rather than determinative.

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V. Compliance Inspection Protocols

A. *How should WISHA staff apply the guidance in Section IV?*

WISHA Compliance Staff are expected to apply the guidance in Section IV when evaluating whether a general contractor can successfully defend against a parallel citation. If the general contractor knew about the violation and took no effective corrective action, however, such an evaluation can be abbreviated. If the question is whether the general contractor clearly should have known about the violation, the inspector is expected to consider the elements of Section IV in greater detail.

Section IV is intended to provide guidance to determine whether the general contractor has provided and implemented a safety program at the work site that is "effective in practice" and is therefore able to defend itself from citation for a violation committed by a subcontractor working under its control, based on the standard of care described by this document. If the general contractor has met its responsibilities under that section, no citation will be issued to the general contractor.

B. *How should WISHA staff determine whether a parallel citation should be issued to a general contractor for a subcontractor's WISHA violation?*

In applying the guidance of this WRD, WISHA staff are expected to apply the following checklist and to document their conclusions (failure of an inspector to do so in whole or in part, however, does not represent a contractor defense to an otherwise valid citation):

1. Determine whether there is a contractor to whom this WRD applies and identify the employers of all employees exposed to hazards;
2. Once it is established that there is a relationship between a general contractor or upper tier subcontractor and the subcontractor(s) being cited, determine whether it appears that a parallel citation is appropriate.
    - Was the general contractor or upper tier subcontractor aware of the violation (either by direct observation or by notification)?
    - If not, was the violation "in plain view" and of such extended duration that the general contractor or upper tier subcontractor *clearly* should have been aware of the violation?
    - If not, did the general contractor or upper-tier subcontractor make little or no effort to maintain a presence on the site?

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3. If the answer to any of the questions in #2 is yes, the general contractor must be cited. If the answer to each of the questions in #2 is "no," then determine whether the affirmative defense of "subcontractor misconduct" is available to the general contractor or upper tier subcontractor by evaluating the following elements:
    - Did the general contractor establish safety work rules?
    - If so, did the general contractor adequately communicate its safety work rules to its subcontractors?
    - If so, did the general contractor establish a process to discover and control recognized hazards?
    - If so, did the general contractor enforce safety on the job site in a manner that was effective in practice (based on the guidance in Section IV above)?

C. If a parallel violation is identified, how should it be cited?

The department has determined as a matter of enforcement discretion that parallel violations will not necessarily be issued to general or upper-tier subcontractors for every violation cited against one or more subcontractor. For this reason, enforcement staff should normally use WAC 296-155-100(1)(a). Violations involving generally similar conditions or hazards should not be cited separately but instead should be handled as instances of a single parallel violation by the general contractor or upper-tier subcontractor. Violations not involving such generally similar conditions or hazards would be addressed in a separate violation.

In other words, the following general categories that might be present on a construction site would each be handled as a separate violation if they were cited at all:

- Working at height (including all violations related to scaffolding, fall protection, guardrails, etc.);
- High voltage (including, but not limited to, violations related to overhead lines and violations related to electrical exposures in underground vaults);
- Trenching and excavation;
- Respiratory protection;
- Personal protective equipment (but not if the PPE involved one of the other categories, such as fall protection equipment or respiratory protection).

Any determination that the interests of worker safety would be better served, due to extraordinary circumstances, by citing the general contractor or upper-tier subcontractor separately for each violation must be approved in advance by the Senior Program Manager of WISHA P&TS.

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D. Should a general contractor or upper-tier subcontractor be issued a parallel citation for a general violation?

The department has determined as a matter of enforcement discretion that parallel citations for general violations will not be issued, nor will parallel violations for program violations be issued regardless of classification (this does not apply to required site-specific plans, such as those involving fall protection or lead).

E. When should repeat violations be issued to a general contractor or upper-tier subcontractor for parallel citations?

Violations of WAC 296-155-100(1)(a) are not automatically repeat violations. Repeat violations must not be cited unless previous parallel violations involve substantially similar hazards (see the list of examples in C above). In addition, a previous violation involving a contractor's direct employees cannot be used as the basis for a repeat parallel violation.

F. How should the exposure of the general contractor or upper-tier subcontractor's own employees to a similar violation be handled?

Violations involving the general contractor's own employees should be cited in accordance with normal agency practice, without regard to the presence of a parallel violation. If a hazardous condition involves employees of both the general contractor and one of more of its subcontractor, both a direct citation and a parallel citation should be issued to the general contractor if both violations are identified in the course of the inspection.

Approved: _____

Michael A. Silverstein
Assistant Director for WISHA Services

For further information about this or other WISHA Regional Directives, you may contact WISHA Policy & Technical Services at P.O. Box 44648, Olympia, WA 98504-4648 or by telephone at (360)902-5503. You also may review policy information on the WISHA Website (http://www.lni.wa.gov/wisha).

APPENDIX A

SUBCONTRACTOR'S SAFETY QUESTIONNAIRE

Name of
Subcontractor:_____

Project:_____ Date:_____

1. List your firm's workers' compensation Interstate Experience Modification Rate for the three most recent years.

19_____ _____ 19_____ _____ 19_____ _____

2. Please use your last year's OSHA No. 200 Log to fill in:

(a) Number of lost workday cases _____

(b) Number of fatalities _____

3. Employee staff hours worked last year _____

4. Do you conduct project safety inspections?

Yes _____ No _____ If yes, how often? _____

and who conducts this inspection (title)? _____

5. List key personnel planned for this project. Please list safety responsible person and his/her experience:

_____ _____

_____

_____

6. Do you have a written Safety Program? Yes _____ No _____

7. Do you have an orientation program for new hires? Yes _____ No _____

8. Do you have a program for newly hired or promoted foremen? Yes _____ No _____

9. Do you hold craft “toolbox” safety meetings? Yes _____ No _____

How often? Weekly _____ Biweekly _____ Monthly _____

Less often, as needed _____

_____

Signature